JUDGING CHILDREN'S RIGHTS AND THE BENEFIT CAP: *R (ON THE APPLICATION OF SG AND OTHERS) V SECRETARY OF STATE FOR WORK AND PENSIONS*

Kathryn Hollingsworth[Ψ]

Keywords: Benefit cap – indirect discrimination - UNCRC - best interests – judicial diversity

Abstract

In *R (on the application of SG and others) v Secretary of State for Work and Pensions* the Supreme Court considered a human rights challenge to the subordinate legislation that implemented the benefit cap which, it was argued, constituted unlawful indirect discrimination because lone parent households would be most affected by the scheme, and the vast majority of lone parents are women. Central to the claim was the relevance of Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC): had the Secretary of State for Work and Pensions acted in breach of his duties to give primary consideration to the best interests of children and, if so, what was the legal relevance of this to the justification of the indirect discrimination against *women*? After setting out the facts, legal issues and decision, this commentary focuses on two of the significant aspects of the case: first Lord Kerr's (dissenting) dicta that Article 3(1) UNCRC is directly enforceable in the UK; and second, the importance of judicial diversity in the context of children's rights.

Introduction

In March 2015, the Supreme Court handed down its final judgment in *R (on the application of SG and others) v Secretary of State for Work and Pensions.*[1] The appellants – two mothers and the youngest child of each - used the Human Rights Act 1998 (HRA) to argue that subordinate legislation which implemented the benefit cap constituted unlawful indirect discrimination because lone parent households would be most affected by the scheme, and

[Ψ] Newcastle Law School. My thanks to Rachel Cahill-O'Callaghan and the anonymous reviewer for earlier comments on this paper.

[1] [2015] UKSC 16, [2015] 1 WLR 1449 (hereafter *SG*). A preliminary judgment was given in October 2014.

the vast majority of lone parents are women. Central to the claim was the relevance of Article 3(1) of the United Nations Convention on the Rights of the Child (UNCRC): had the Secretary of State for Work and Pensions acted in breach of his duties to give primary consideration to the best interests of children and, if so, what was the legal relevance of this to the justification of the indirect discrimination against *women*?

SG is one of a number of legal challenges to the austerity measures introduced by the Coalition Government (ostensibly) to reduce the budget deficit.[2] These cases – which include judicial reviews of the 'bedroom tax',[3] disability benefits[4], and legal aid reform[5] - show the possibilities and the limitations of adjudicating socio-economic rights, particularly using the European Convention on Human Rights (ECHR).[6] *SG* is also significant because of what the Supreme Court said about the relevance of the UNCRC to discrimination felt by *mothers* (not children) and – in Lord Kerr's judgment - the status of Article 3(1) UNCRC in UK law. The Court was split. Lord Carnwath, Lady Hale and Lord Kerr found that the Secretary of State had breached his international obligations under Article 3(1) UNCRC: the benefit cap was thus held to infringe children's rights by three of the five Justices. Nonetheless, and '[w]ith considerable reluctance'[7], Lord Carnwath felt compelled to conclude that Article 3(1) UNCRC was not relevant to the question of whether the indirect discrimination was justified. He therefore agreed with Lords Reed and Hughes that the benefit cap scheme was lawful.

The case is important because it explores the Government's obligations under Article 3(1) UNCRC in the context of socio-economic policy. This is considered in the discussion of the facts, legal issues and decision.[8] The focus then turns to two aspects of the case that I found

[2] See, primarily, the Welfare Reform Act 2012 and the Legal Aid, Sentencing and Punishment of Offenders At 2012 and *SG*, at paras [17]-[24], as per Lord Reed.
[3] See, eg *Burnip v Birmingham City Council* [2012] EWCA Civ 629, [2012] HRLR 20; *R (on the application of MA) v Secretary of State for Work and Pensions* [2014] EWCA Civ 13, [2014] PTSR 584.
[4] *R (on the application of C) v Secretary of State for Work and Pensions* [2015] EWHC 1607 (Admin) and see, generally, N Harris, 'Welfare Reform and the Shifting Threshold of Support for Disabled People' (2014) 77 (6) *Modern Law Review* 888.
[5] See, eg *R (on the application of Rights of Women) v Lord Chancellor* [2015] EWHC 35 (Admin), [2015] Fam Law 277; *R (on the application of Howard League for Penal Reform) v Lord Chancellor* [2015] EWCA Civ 819 (permission to take judicial review).
[6] On which see, eg S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008); A Nolan, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011); J King, *Judging Social Rights* (Cambridge University Press, 2012).
[7] Para [129].
[8] The decision is *SG* extends to 270 paragraphs. Space precludes a comprehensive examination of all the children's rights aspects of the case.

particularly striking: Lord Kerr's finding that Article 3(1) UNCRC is directly enforceable in UK law; and the differences in *how* the Justices reasoned in *SG*, which may reveal the impact of demographic differences and tacit influences on a judge's propensity to adopt a 'children's rights approach'[9] to judging.

The Facts

SG provides a fascinating example of how facts given, and thus the stories told or not told by judges, shape and support judicial reasoning and decision-making.[10] This is considered further in the discussion below. For now, the key details are these. In 2012, following the financial crisis and ostensibly in an attempt to reduce the UK's structural fiscal deficit, Parliament passed the Welfare Reform Act 2012 with promised savings of £11 billion. The reforms set out in the Act included the introduction of universal credit, penalties for under-occupancy of housing (the 'bedroom tax'), the replacement of the disability living allowance with personal independence payment and, in section 96, the benefit cap - an upper limit (the 'relevant amount') that individuals and couples are entitled to receive in welfare benefits. Section 96 is skeletal, requiring only that the 'relevant amount' be calculated by reference to 'estimated average earnings'; that welfare benefits falling within the competences of the devolved nations are not affected; and that pensions are excluded from the cap.[11] All other aspects of the scheme, including how the amount received in welfare is to be determined, which benefits are subject to the cap, and any exceptions to be applied, are set out in regulations;[12] thus conferring on the Secretary of State considerable discretionary powers.

In November 2012, the Benefit Cap (Housing Benefit) Regulations[13] were introduced which set the 'relevant amount' – the cap - at £500 for couples and individuals with children and £350 for single people. The Regulations also provided that the cap does *not* apply (at all) where the claimant or his/her partner receives working tax credit: that is, most working

[9] J Tobin, 'Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?' (2009) 33 Melbourne University Law Review 579.
[10] See, eg R Hunter, C McGlynn and E Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).
[11] Welfare Reform Act 2012, ss 96(6), 96(9) and 96(11) respectively.
[12] Ibid, s 96(4).
[13] SI 2012/2994.

households are excluded from the scheme.[14] Instead, the cap applies to a range of other benefits, including jobseekers allowance, child tax credit, child benefits and housing benefits. 50,000 households were initially estimated to be affected by the cap, losing an average of £93 a week.[15] Of these, the cap impacts most on non-working families with several children (who are thus in receipt of the highest child-related benefits) living in high-cost areas where rent – and consequently housing benefit – is considerable. Within this group, lone parents are especially negatively affected because their ability to mitigate the impact of the cap - by securing work or moving house - is more difficult practically and financially, partly because of the challenge of finding suitable, affordable, childcare.[16] As Lord Justice Elias noted in the divisional court:

> it is a striking feature of the scheme – and lies at the heart of this application – that the cap applies equally to a childless couple in an area with cheap and plentiful social housing as it does to a lone parent mother of several children in inner London compelled to rent on the private market.[17]

This was the key issue in *SG*: the disproportionate impact on single parent families equated to a disproportionate impact on women because 92% of lone parents are mothers.[18] The benefit cap was therefore indirectly discriminatory.

The four appellants in the Supreme Court were two women - SG and NS - and the youngest child of each.[19] Both women had escaped abusive relationships and lived with three dependent children in high-cost London accommodation (albeit small, two-bedroomed flats). Like many lone parents, SG and NS argued that they were unable to readily mitigate the effects of the cap in the ways envisaged by the Government[20]: securing work was difficult because they had children under five, and NS did not speak much English; their very low

[14] Regulation 75E(1)(2) (as per Lady Hale at para [164]). A person becomes entitled to working tax credit when they work for 16 hours per week or more if they are a single parent or a disabled person; 24 hours per week for a couple with children.
[15] Para [25], as per Lord Reed.
[16] 50% of households affected were expected to be single parents with children; 39% couples with children. See para [50], as per Lord Reed.
[17] [2013] EWHC 3350 (QB); [2014] PTSR 23, at para [28].
[18] *SG* at para [2] as per Lord Reed.
[19] With Shelter and the Child Poverty Action Group (CPAG) intervening. A third family were claimants in the divisional court but as they had subsequently fallen below the benefit cap they withdrew from the appeal before it reached the Supreme Court.
[20] See para [25] as per Lord Reed.

income meant there was little scope to reduce out-goings; in the competitive London housing market they were in no position to negotiate lower rent from their landlords (indeed, SG's rent was set to rise); and strong ties to their local communities inhibited their ability to move to cheaper housing areas.[21] A judicial review claim was therefore brought challenging the legality of the Regulations. In the divisional court there were five related grounds: (i) the cap unlawfully discriminates against women generally, or women who are victims of domestic violence, in breach of Article 14 of the ECHR[22] read with Article 1 Protocol 1 (AIPI: freedom to peaceful enjoyment of possessions); (ii) the cap infringes Article 3(1) UNCRC; (iii) the cap unlawfully breaches the Article 8 rights of families[23] in conjunction with Article 14; (iv) the cap breaches Article 8 per se; and (v) the cap is unlawful at common law on the grounds of irrationality.[24] The claimants lost their claim, and an appeal to the Court of Appeal also failed.[25]

By the time the appeal reached the Supreme Court, there were two primary questions to be considered.[26] First, was the discriminatory effect on lone mothers (conceded by the Secretary of State) justified, such that there was no breach of Article 14, read in conjunction with Article A1P1? Second, had the Secretary of State acted compatibly with his obligation under Article 3(1) UNCRC to treat the best interests of children as a primary consideration when implementing the benefit cap?[27] The Court was split on both issues. Lord Reed, with whom Lord Hughes agreed, found in favour of the Secretary of State that the discrimination was justified and therefore lawful. Neither Justice accepted that the Secretary of State had breached his duties under Article 3(1) UNCRC and, even if it was assumed that he had, this

[21] For a detailed and compelling account of the appellants' circumstances see Lady Hale at paras [169]-[177], [182], [202]-[203], and [206].

[22] The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[23] The right to respect for private and family life, home and correspondence.

[24] These were, strictly speaking, three claims but I have disaggregated two for clarity because of how they were dealt with by the Supreme Court. [2013] EWHC 3350 QB, [2014] PTSR 23 at paras [28] ff, as per Elias LJ.

[25] [2014] EWCA Civ 156, [2014] HRLR 10.

[26] Two other issues were also put to the court: (i) was the Court of Appeal wrong to have declined to decide whether the scheme under the regulations had an unlawfully disproportionate impact on victims of domestic violence, and (ii) was the Court of Appeal wrong not to have found that the disproportionate impact on victims of domestic violence was contrary to Article 14 read with Article 8 ECHR? The alleged discriminatory impact on victims of domestic violence – the majority of whom are woman – arose because they are more likely to need double payment of housing benefit (for temporary housing when escaping an abuser, as well as for the family home until they are able to return). However, the Supreme Court decided that the discrimination against lone parents and the breach of Article 3(1) UNCRC should be the focus of the appeal (see Lord Reed at para [62]; Lord Carnwath at para [98] and Lady Hale at para [183]-[187]).

[27] At para [97], as per Lord Carnwath.

was not legally relevant to the justification of the discrimination. Lady Hale and Lord Kerr dissented, finding that the Secretary of State *had* breached his duties under Article 3(1) UNCRC *and* that this was integral to the indirect discrimination, which was, therefore, unjustified. Lord Carnwath's decision proved crucial to the outcome of the appeal, and demonstrated how close the decision was. He agreed with Lady Hale and Lord Kerr that the Secretary of State had breached his international obligations: the benefit cap as set out in the Regulations, which included child-related benefits, *does* breach children's rights. Thus, his 'provisional view at the end of the hearing was that, in their application to lone parents and their dependent children, the Regulations were not compatible with Convention rights, and thus the court should so declare'.[28] However, the Supreme Court then allowed an application from counsel for the Secretary of State for post-hearing submissions to be made on the legal relevance of the UNCRC to the issue of discrimination vis a vis A1P1 (Lord Carnwath noting that during the hearing, the submissions regarding the UNCRC had primarily been directed towards its relevance to Article 8 ECHR). It was after the post-hearing submissions that Lord Carnwath changed his view and agreed with Lord Hughes and Lord Reed that the breach of Article 3(1) UNCRC did *not* support the claim that the indirect discrimination against women was unjustified. The Regulations were thus lawful and the appeal was lost.

The Legal Issues and the Decision

The benefit cap and indirect discrimination against women

The challenge in *SG* was limited to the implementation of the scheme via the Regulations; the claimants did not seek to use the HRA to question the legality of the benefit cap per se, the principle (if not the detail) of which was set out in the primary legislation. This may have been tactical – to avoid bringing the courts into direct conflict with Parliament over a highly political issue. Nonetheless, had the claim been successful the utility and purpose of the benefit cap as a whole would effectively have been thwarted because excluding child-related benefits (and thus addressing the discrimination) would, claimed the Secretary of State, 'emasculate' the scheme. *SG* was, therefore, a highly political (with a small 'p') case, the crux of which was whether the Regulations were unjustifiably discriminatory against women, and thus a breach of Article 14 ECHR read with either Article 8 or A1P1. The Secretary of State did not contest the applicability of A1P1 (it was accepted that 'possessions' includes

[28] Para [112].

welfare benefits) and so it was on this basis – rather than Article 8 - that the Court considered the discrimination claim.[29]

A1P1 does not oblige a State to provide a system of social security, but where it 'does decide to create a benefits . . . scheme, it must do so in a manner which is compatible with article 14 of the Convention'.[30] The Regulations were not directly discriminatory because they applied to all claimants – male or female - in the same way. However, 'it is clear . . . that the benefit cap has a disproportionate adverse impact on women'[31] because – as noted above - 60% of households affected comprise single parents living with children, and 92% of lone parents are women. This constitutes indirect discrimination.[32] As Lady Hale stated:

> The prejudicial effect of the cap is obvious and stark. It breaks the link between benefit and need. Claimants affected by the cap will, by definition, not receive the sums of money which the state deems necessary for them adequately to house, feed, clothe and warm themselves and their children. Furthermore, the greater the need, the greater the adverse effect. The more children there are in a family, the less each of them will have to live on . . . This prejudicial effect has a disproportionate impact upon lone parents, the great majority of whom are women . . . [33]

The indirect discrimination was conceded by the Secretary of State and so the case turned on whether it could be justified; that is, whether there was a legitimate aim for the discriminatory measure and a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'.[34] Ordinarily under Article 14, the test as to whether the discrimination on the basis of sex is justified is a particularly strict one: 'weighty reasons' are needed to convince a court to find that a difference in treatment on the grounds of sex is

[29] It was not argued that the benefit cap violated A1P1 per se.
[30] *Stec v United Kingdom* (2006) 43 EHRR 1017. See para [178], as per Lady Hale. There is a violation of Article 14 if there is (i) a difference in treatment; (ii) of persons in relevantly similar positions; (ii) if it does not pursue a legitimate aim (drawing on those in the second paragraphs of articles 8-11) or (iv) if there is not a reasonable relationship between the means employed and the aim sought to be realised. *Carson v United Kingdom* (2010) 51 EHRR 369, para [61] and *SG* (per Lord Reed) at paras [7]-[8].
[31] Para [71], divisional court, cited by Lady Hale at para [179].
[32] See *Jordan v United Kingdom* (2001) 37 EHRR 52; *Hoogendijk v Netherlands* (2005) 40 EHRR SE 189 and *DH v Czech Republic* (2007) 47 EHRR 59, para [175] (cited by Lady Hale at [179]).
[33] Para [180].
[34] *SG* at para [64], as per Lord Reed.

Convention-compatible.[35] However, where the issue concerns social and economic policy – as here - States enjoy a wider margin of appreciation (or, in domestic nomenclature, a 'discretionary "area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body . . "'[36]) and a different test – developed in *Stec* and applied domestically in *R (MA) v Secretary of State for Work and Pensions* - applies.[37] This test – that the measure be 'manifestly without reasonable foundation' - was agreed by all parties to be the correct one applicable in this case (both in relation to the aims of the interference and the proportionality of the measure),[38] and was, therefore, the test applied by all the Justices.

As Lady Hale explained, in a discrimination case such as this the Government is not required to explain why they introduced a benefit cap scheme per se, '[t]hat can be readily understood'.[39] Rather, they have to justify 'why they brought in the scheme in a way that has disproportionately adverse effects upon women';[40] and further, because the measure is neutral on its face as between men and women, '[i]t is therefore the measure itself which has to be justified, rather than the fact that women are disproportionately affected by it'.[41] Three justifications (or 'legitimate aims') were put forward by the Government,[42] all of which were founded on the general aim of securing the economic well-being of the country. First, it was asserted that the benefit cap promotes a fairer system of welfare as between working and non-working households that would in turn help to increase public confidence in the system and reduce the stigmatization of those in receipt of benefits.[43] Second, the Government wanted to reduce public expenditure by cutting the welfare bill. Third, the benefit cap aims to motivate people to find employment by ensuring that those in work are better off than those on benefits. For Lord Reed, giving the leading judgment for the majority, it 'could not be doubted' that these were legitimate aims for the purposes of Article 14, and in carrying out the proportionality assessment he followed the divisional court and the Court of Appeal in emphasising that the benefit cap concerned the use of resources for those in need: a socio-

[35] Lord Carnwath at para [120] and Lady Hale at para [208], citing the Strasbourg Court in *Stec* (fn 30 above) at para [52].
[36] Lady Hale at para [159] quoting Lord Hope in *R v DPP, ex parte Kebilene* [2000] 2 AC 326, at p 381.
[37] [2014] PTSR 584 (see Court of Appeal in *SG* [2014] EWCA Civ 156, [2014] PTSR 619 at para [27]).
[38] See para [210], as per Lady Hale.
[39] Para [188].
[40] Ibid.
[41] Para [189].
[42] See eg, paras [4], [17] and [24], as per Lord Reed and paras [190]-[207], as per Lady Hale.
[43] Lord Reed, para [66].

economic issue that was 'par excellence a political question'.[44] Thus, due deference was given to the assessments of the executive, and emphasis was placed on the fact that the Regulations had been approved by Parliament using the positive resolution procedure,[45] and that during the passage through Parliament of the Welfare Reform Act the legislature had specifically considered whether child-related benefits should be excluded from the cap, and decided they should not.[46]

The counter-arguments made by the appellants were given short shrift by Lord Reed. They claimed, for example, that the scheme failed to compare like with like because the 'relevant amount' (ie the level of the cap) was determined by reference to estimated average 'earnings', thus excluding income received in benefits by working households with children (child benefits and child tax credit): a fairer scheme, they argued, should have set the relevant amount according to 'average income' (ie earnings plus benefits). Lord Reed dismissed this argument for three reasons: first, because the Act specified that the cap was to be set by reference to 'earnings' and thus if other income were included the Regulations would be ultra vires; second, the assessment of the level at which the cap would represent fairness between working and non-working households is a question of political judgment;[47] and finally, because of the Government's belief (endorsed by Parliament) that using average income as the marker would be less effective at achieving the other aims – incentivising work and reducing public expenditure. Lord Reed was similarly dismissive of the appellants' claim that any savings from the benefit cap would be marginal[48], pointing out that they were still intended to reduce the fiscal deficit and further, they would have long-term savings when purported shifts in the (so-called) welfare-dependency culture take place. The final set of arguments made by the appellants concerned the third aim: to incentivise employment and promote long-term behaviour change. The Government had accepted that certain groups, including pensioners and people with disabilities, should not have the cap applied to them

[44] Divisional court at para [85]

[45] Though, as the appellants pointed out, amendments cannot be introduced during this process and so the ability of Parliament to exert influence or convey disapproval of certain provisions is highly curtailed.

[46] On the basis that excluding child benefit would reduce the savings from the cap by 40-50% and excluding child tax credit would reduce it by 80-90% (Hansard HC Debs 28 Nov 2011, col 763W (cited by Lord Reed, para [41])).

[47] Lord Reed stressed that 'the assumption that fairness requires an equivalence between the incomes of working and non-working households ignores the costs incurred by working households in earning that income: both financial costs in respect of such matters as travel and clothing, and non-financial costs in respect of time spent commuting and working'. Para [69].

[48] Compare with Lady Hale's assessment that it was a 'drop in the ocean' (at para [195]).

since they are not expected or are unable to seek employment, and thus cannot mitigate its effect. The appellants contended that the same is true of lone parents who face difficulties securing and meeting the costs of appropriate child-care, particularly – but not only – those with children under the age of five. For Lord Reed, this argument was undermined by statistics which showed that 63.4% of single parents with dependent children were in work: 'plainly, many single parents, including those on low incomes, make arrangements for the care of children in order to work' and though many people may take the view that it is better for single parents of a young child to remain at home full-time with the child, 'there is no basis for requiring that view to be adopted by Government as a matter of law'.[49]

For Lord Reed (and Lord Hughes), without an underpinning children's rights argument to shore up the claim, the indirect discrimination against women was therefore justified: it was not manifestly without reasonable foundation despite (in the words of Lord Justice Elias in the divisional court) 'the genuine and very real hardship that these policies will cause for certain groups'.[50]

Children's Rights

Although it was not the only difference between Lords Reed and Hughes on the one hand, and the other three Justices on the other,[51] central to the reasoning of Lady Hale, Lord Kerr and Lord Carnwath was whether the benefit cap breached Article 3(1) UNCRC and the relevance of this to the ECHR rights of lone mothers. It is well established that the European Court of Human Rights (ECtHR) draws on other international treaties to interpret the ECHR[52] and it has made particular use of the UNCRC when articulating *children's* Convention rights.[53] The UNCRC has therefore been used to interpret a number of ECHR

[49] Para [74].
[50] Divisional court, at para [87].
[51] See for example, the clarity of Lady Hale's explanation of *what* must be justified in an indirect discrimination claim (fn 41 above) and how that impacted on their proportionality assessment. Lady Hale also placed little weight on the first two justifications given by the Government (the fairness argument, and the reduction in public expenditure argument – see para [229]) and instead agreed with the appellants that '[o]n analysis . . . the Government's aims come down to incentivising work and promoting long term behavioural change' (at para [199]).
[52] In accordance with Article 31 of the Vienna Convention on the Law of Treaties (1969).
[53] See eg the work of Ursula Kilkelly including *The Child and the European Convention on Human Rights* (Ashgate, 1999); 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 Human Rights Quarterly 308; and 'The CRC in Litigation Under the ECHR: The CRC and the ECHR: The Contribution of the European

rights.[54] However, Article 8 has acquired particular significance in part because the ECtHR and the UK Supreme Court have held that the child's best interests must be a primary consideration when determining the lawfulness of a restriction pursuant to Article 8(2).[55] As such, Article 8 appeared to be the obvious vehicle for the Article 3(1) UNCRC argument in *SG*. However, as noted above, in the Supreme Court the claim was primarily heard in relation to A1P1/Article 14 and no submissions were made during the hearing on the relevance of Article 3(1) to those rights.[56] Moreover, in the Court of Appeal and initially before the Supreme Court, the Secretary of State had not challenged the applicability of the UNCRC to the Court's assessment of the legality of the Regulations. Presumably, it was only when it became clear that the decision was likely to go against him (given Lord Carnwath's preliminary view that there had been a breach of Article 3(1) and thus the Regulations were unlawful), that the Secretary of State realised the importance of arguing that Article 3(1) was *not* relevant to the discrimination claim. He thus requested – and was granted - permission to put post-hearing submissions before the court on this point. Two questions were considered: first, had the Secretary of State complied with his obligations under Article 3(1); and second, if not, what was the relevance of this to the legality of the benefit cap scheme.

Had the Secretary of State complied with his obligations under Article 3(1)?

The Divisional Court and the Court of Appeal (with whom, as noted, Lords Reed and Hughes agreed) held that the Secretary of State had acted in accordance with Article 3(1). As explained by Lord Carnwath, five reasons were given by the lower courts for this conclusion[57]: (i) the 2010 Treasury Spending Review made clear that a principal objective was 'to raise children out of long term poverty'; (ii) the February 2011 Impact Assessment showed that the Government was 'keenly aware' of the likely impact on children; (iii) the February 2011 Equality Impact Assessment stressed the objective of reversing detrimental impact on families and children of benefits dependency, and indicated that the government was looking at ways to ease the transition for large families; (iv) Parliamentary debates

---

Court of Human Rights to the Implementation of Article 12 of the CRC' in T Liefaard and JE Doek (eds), *Litigating the Rights of the Child* (Springer, 2015).

[54] See, eg *T v United Kingdom* (on children's Article 6 rights) (1999) 30 EHRR 121.

[55] See *Neulinger v Switzerland* [2011] 1 FLR 122 and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148.

[56] See Lord Carnwath at para [113] and Lord Hughes at para [138].

[57] Para [104].

focused on the interests of children; and (v) the July 2012 Impact Assessment revised the assessment of the number of children likely to be affected and addressed the issue of short term relief. These were accepted by Lord Reed and Lord Hughes as providing sufficient evidence that the best interests of children had been a primary consideration: 'the evidence could not really be clearer . . .'.[58]

However, neither Lord Carnwath (who drew extensively on General Comment No 14 of the UN Committee on the Rights of the Child[59]), Lady Hale nor Lord Kerr held this to be sufficient to comply with Article 3(1).[60] Not only did the impact assessments relate to the statute and not the regulations,[61] they were also primarily procedural and did not adequately consider whether *substantively* the scheme treated children's best interests as a primary consideration when developing the scheme.[62] Being 'keenly aware' of children's interests is not the same as saying that the 'rights of children were, throughout, at the forefront of the decision-maker's mind'[63] or treated as a primary consideration; it was 'clear' to Lady Hale – and to Lords Carnwath and Kerr - that they were not.

Furthermore, the impact assessments upon which the Government relied as evidence of meeting its obligations under Article 3(1) only considered the interests of children in *general* (concluding that the cap was to their benefit because it reduces 'a culture of benefit-dependency'[64] and thus meets the long-term objective of taking children out of poverty – even though there is little evidence as to whether this is achievable), but they failed to examine the impact on children who are directly, and negatively, affected by the cap, contrary to the requirements of General Comment No 14.[65] A subsequent report by the Children's Commissioner predicted that the cap would result in an increase in child poverty, the loss of homes, that it would incentivise family breakdown, and would have a

[58] Lord Hughes, para [155].
[59] See paras [105]-[106]. GC No 14 provides the definitive interpretation of Article 3(1). See *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art 3., para.1) CRC/C/GC/14, 29 May 2013, adopted by the Committee at its sixty-second session.
[60] For the arguments put forward by the appellant's Counsel for what Art 3(1) would require, see para [154] (as per Lord Hughes).
[61] Lord Carnwath, para [109].
[62] See GC No 14 which describes best interests as a three-fold concept, comprising of (i) a substantive right; (ii) a fundamental, interpretative legal principle; and (iii) a rule of procedure (the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned).
[63] Lady Hale at para [225] quoting the Court of Appeal.
[64] Lord Hughes, para [153].
[65] See paragraph 6 of GC No 14, and also Lord Carnwath at paras [108]-[109].

disproportionate impact on BME communities.[66] All of these potential consequences are contrary to the elements of best interests identified in GC No 14, for example the right to health; care protection and safety of the child (which must be 'read in the broad sense' to include 'basic material, physical, educational and emotional needs . . .'[67]); and, where a family is forced to move to mitigate the cap, to the preservation of family environment and maintaining relations (which includes the 'preservation of ties in a wider sense . . .to the extended family . . . as well as friends, school and the wider environment . . [68]). As Lady Hale stated:

> [I]t cannot possibly be in the best interests of the child affected by the cap to deprive them of the means to provide them with adequate food, clothing, warmth and housing, the basic necessities of life. It is not enough that children in general, now or in future, may benefit from a shift in welfare culture.[69]

Article 3(1) and the indirect discrimination claim

As noted, neither Lord Reed nor Lord Hughes accepted that Article 3(1) had been infringed. Moreover, they both held that *even if it had* it was not relevant to the issue of discrimination.[70] Lord Carnwath reluctantly agreed with this conclusion, on the basis that the children of lone fathers are as affected by the cap as those of lone mothers and so the breach of children's rights did not inform the question of discrimination against women.[71] However, for Lady Hale and Lord Kerr the breach of Article 3(1) UNCRC *was* relevant to the legality of the benefit cap Regulations. For Lord Kerr, this was because he regarded Article 3(1) as directly enforceable in UK law (discussed below). Lady Hale's reasoning (with whom Lord

[66] Para [110].
[67] GC No. 14, para. 71.
[68] GC No. 14, para 70.
[69] Lady Hale at para [226]. Nb Lord Reed rejected the argument that destitution would result from the Regulations *per se* (emphasising that to deem the Regulations unlawful requires that they have this general effect and do not just impact on a few individuals in this way). He pointed to the fact that the benefit cap was still three times the average minimum wage and that half of the working population were on less than £35,000 (the cap for families). However, this does not account for the fact that such families would also be entitled to benefits.
[70] 'The questions '(1) whether legislation of this nature should be regarded as 'action concerning children' within the meaning of article 3(1) of the UNCRC; (2) whether that provision requires such legislation to be in the best interests of all children affected by it and (3) whether the Regulations fulfil that requirement, appear to me to be questions which . . it is unnecessary for the court to decide'. Para [88], as per Lord Reed.
[71] Para [129]. See also Lord Reed at para [87]-[89].

Kerr also agreed in the alternative) was less radical (in that it did not involve overturning constitutional orthodoxy) but it departed from the majority view in two significant ways.

First, refuting the argument made by the Secretary of State to the contrary, she held that Article 3(1) applies equally to the enjoyment of rights without discrimination (ie to proportionality assessments under Article 14) as it does to the enjoyment of Convention rights per se.[72] Second, based on her reading of *X v Austria* (a case concerning the prohibition on two people of the same sex legally adopting a child[73]), Lady Hale found that children's best interests can be relevant even when it is the parent – not the child - suffering the discrimination where, in the words of Lord Kerr, there is a 'sufficient identity of interest'[74] between the child and his or her lone parent. Neither Lord Reed, Lord Hughes, nor Lord Carnwath accepted that the enjoyment of property, and specifically the application of the benefit cap, is a context in which the interests of the parents are inseparable from their child.[75] However, as Lord Kerr explained, it is because the women are lone *parents* that they experienced the discrimination and because the discriminatory measure – the benefit cap as it applies to lone parents – restricts their ability to fulfil their duties to their children (by restricting the money available to clothe, house, and feed them) then the children's interests are affected by it: 'Because, therefore, one cannot segregate the interests of the deprived children from those of their mothers, the discrimination against mothers and their children is of the same stripe'.[76] Accordingly, when assessing the justification for the scheme, which by including child benefits therefore indirectly discriminates against women, the interests of children must feature in that assessment. In line with Article 3(1) UNCRC therefore, children's best interests must be a primary consideration in determining whether the discrimination was 'manifestly without reasonable foundation'. Since Lady Hale and Lord Kerr had found that the discriminatory impact of the benefit cap *cannot* be in the best interests of children, and the countervailing arguments were not sufficient to outweigh that breach,[77] they held – in their dissents - that the Regulations were unlawful.

[72] Paras [217] and [222].
[73] (2013) 57 EHRR 405. See para [222] as per Lady Hale.
[74] Para [234].
[75] In contrast to a case like *X v Austria.* They did, however, accept that children were affected by the cap. See para [87], as per Lord Reed and para [146], as per Lord Hughes.
[76] Para [265] as per Lord Kerr
[77] Lady Hale at para [229]: 'Families in work are already better off than those on benefits and so the cap is not necessary in order to achieve fairness between them; saving money cannot be achieved by unjustified discrimination, but the major aim, of incentivising work and changing the benefits culture, has little force in

Discussion

Direct Enforcement of Article 3(1)

The UNCRC has not been incorporated fully into domestic law[78] and so its use by the courts is constitutionally limited to three situations: interpreting ambiguous legislation; developing and resolving ambiguities in the common law; and (as in *SG)* interpreting ECHR rights.[79] Somewhat surprisingly then, and contrary to the long-settled view[80] that international treaties are neither justiciable[81] nor directly effective in UK national law[82], Lord Kerr held that Article 3(1) *is* directly enforceable.[83] In justifying this approach, Lord Kerr drew on limited judicial dicta[84] and the work of a few scholars[85] to argue that human rights treaties – including the UNCRC – provide an exception to the 'constitutionally orthodox' dualist theory that the Government cannot use its prerogative powers to circumvent the sovereign Parliament to create new legal rights and obligations.[86] Human rights treaties are an exception because:

> . . . [if] the rationale for the dualist theory [is] as a form of protection of the citizen from abuses by the executive, [then] the justification for refusing to

---

the context of lone parents, whatever the age of their children. Depriving them of a basic means of subsistency cannot be a proportionate means of achieving it'.

[78] Despite the recommendations of the UN Committee on the Rights of the Child (*Concluding Observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland*, 2002, CRC/C/15 Add 188 and 2008, CRC/C/GBR/CO/4), the House of Lords House of Commons Joint Committee on Human Rights (*The UK's compliance with the UN Convention on the Rights of the Child,* 2014, Eigth Session of Session 2014-15 HL Paper 144 HC 1016) and academic scholars (see, inter alia, J Williams, 'England and Wales' in T Liefaard and JE Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer 2015) at p 68 and J Fortin, *Children's Rights and the Developing Law* (Cambridge, 2011, 3rd ed) at p 51).

[79] Kilkelly (2001), fn 53 above. Whether international treaties can also give rise to a legitimate expectation is 'controversial' (see Lord Kerr, at para [246]).

[80] Recounted in Lord Reed's judgment at para [90].

[81] That is, that 'domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law' (para [235], as per Lord Kerr).

[82] Such treaties are 'not part of that law and therefore cannot be given direct effect to create rights and obligations'. Ibid.

[83] See paras [235]-[257].

[84] See, eg *McKerr's Application for Judicial Review, Re* [2004] UKHL 12; [2004] 1 WLR 807*; Lewis v AG of Jamaica* [2001] 2 AC 50 PC.

[85] See, eg B Dickson, 'Safe in their Hands? Britain's Law Lords and Human Rights' (2006) 26 *Legal Studies* 329 and M Hunt, *Using Human Rights Law in English Courts* (Hart Publishing, 1997). The strength of these arguments is considered in B Malkani, 'Human Rights Treaties in the English Legal System' (2011) *Public Law* 554.

[86] See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* ("International Tin Council") [1990] 2 AC 418.

> recognise the rights enshrined in an international convention relating to human rights and to which the UK has subscribed as directly enforceable in domestic law is not easy to find.[87]

Children's rights advocates, driven by the 'desire to see rules of international law which are thought, perhaps, to be more progressive than ordinary domestic law incorporated by judicial adoption into domestic law'[88], may welcome Lord Kerr's dicta in *SG*. However, although Lord Kerr narrows his position in at least two ways (first by saying that human rights treaties are an exception to, not a 'complete abandonment' of, the dualist theory;[89] and second, by limiting his comments to the direct enforcement of Article 3(1) and not the UNCRC as a whole[90]), the arguments against the direct enforceability of human rights treaty provisions are not easily set aside.[91] This section considers whether these objections apply with as much force to the UNCRC and, more specifically, Article 3(1).

The first objection to the 'exception argument' relied on by Lord Kerr is that, as Malkani notes, it relies on a narrow (pre-Diceyean) version of Parliamentary sovereignty that regards Parliament's role as being to prevent the executive acting to the detriment of the people. Under this account, Parliamentary sovereignty is not usurped by imposing on the Government in domestic law constraints it willingly adopted through treaty ratification.[92] However, the more accepted justification for Parliamentary sovereignty is founded on ideas of democracy and legitimacy: Parliament is representative of and accountable to the electorate and its will (founded on practical reason) represents the common good. On this constitutional understanding, it is much harder to see human rights treaties as a legitimate exception to the dualist theory. Unincorporated treaty provisions do not represent the will of the people (as determined by the legislature) and nor are they necessarily the outcome of

[87] Para [255]. Lord Kerr also set out a second argument against the orthodox position: that Parliamentary sovereignty is no longer the basis of the British constitution, the rule of law is (see eg the comments by Lord Hope in *R (Jackson) v Attorney General* [2005] UKHL 56); and that the rule of law contains a substantive element such that human rights as set out in international treaties should be protected in the courts. However, Lord Kerr accepted that 'such a far-reaching approach is unlikely to find favour in the courts of this country' (para [253]).

[88] P Sales and J Clement, 'International Law in Domestic Courts: The Developing Framework' (2008) *124 Law Quarterly Review* 388 at p 390.

[89] Para [254].

[90] Although this is not excluded by his argument.

[91] Malkani, fn 85 above, provides an additional argument in favour of the 'exception': that unlike other treaties, human rights treaties do not depend on reciprocity with other states; compliance can be determined based only on that state's unilateral action.

[92] Malkani, fn 85 above, at p 561.

'practical reason' (or, as Lord Kerr puts it, the 'product of extensive and enlightened consideration'[93]); rather, treaties are the result of negotiation and political compromise.[94] As Sales and Clement warn 'there is a risk in adopting principles which have been negotiated and developed without detailed political debate and without a specific context within which the solution is aimed'. This, they argue, 'leads to the risk of political gestures, (often deliberate) ambiguity and insufficiently focused and detailed treaty provisions . . .being translated too readily into binding domestic legal rules'.[95]

Prima facie, this critique applies equally to the UNCRC as to other human rights treaties. As King has noted:

> '. . . .while it is true that before it could be treated as law within individual states the Convention had to be ratified, in practice the national governments were presented with a ready-made package that they could either accept, reject or accept with reservations . . .In the UK there was certainly no detailed debate on the contents of the Convention in Parliament . . .'.[96]

But these constitutional objections are neither static nor necessarily insurmountable. Malkani, for example, has suggested that since the Constitutional Reform and Governance Act 2010 (which now requires treaties to be laid before Parliament prior to ratification[97]) a stronger, more legitimate, case can be made for the courts to treat human rights treaty provisions as directly enforceable, on the basis that Parliament has 'acquiesced' to them.[98] Although this legislation was passed almost 20 years after the UK ratified the UNCRC, an analogous argument could be made if it can be shown that there has been *ex post* Parliamentary endorsement of the Convention: for example, the reliance on the UNCRC by the Joint Committee on Human Rights in its scrutiny of Government, or the Committee's recent support for incorporation of the Convention.[99] Or perhaps the fact that Parliament has

[93] Para [256].
[94] Malkani, fn 84 above at p 564.
[95] Sales and Clement, fn 88 above at p 391.
[96] M King, 'Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention' (1994) 57 *Modern Law Review* 385.
[97] Constitutional Reform and Governance Act 2010, s 20.
[98] Malkani, fn 85 above.
[99] Joint Committee on Human Rights, fn 78 above at para 34.

not overtly *rejected* the Convention, unlike the Danish legislature,[100] is demonstrative of implicit acquiescence. These claims are, of course, flimsy, especially when considered in light of the 2009 private members' bill to incorporate to the UNCRC that failed to get past the first reading.[101] A stronger case can be made, however, where the argument is confined to the direct enforcement of Article 3(1). The best interests concept is, by its very nature, 'ambiguous' and 'insufficiently detailed' (as per Sales and Clement's critique)[102] but nonetheless it *has* been subject to Parliamentary debate and scrutiny and its endorsement is evident by its inclusion in legislation, most notably section 11 of the Children Act 2004[103] which reflects the 'spirit, if not the precise language'[104] of Article 3(1).[105] However, the section 11 obligation (to have regard to the welfare of children) does *not* extend to Government ministers, making it hard to impute a Parliamentary intent that ministers should be so bound.[106]

---

[100] Where incorporation was specifically considered, and rejected. See Denmark, *Third State Part report to the UN Committee on the Rights of the Child*, CRC/C/129/Add.3, 2005, para 16 (referred to in L Lundy, U Kilkelly and B Byrne, 'Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review ' (2013) 21 International Journal of Children's Rights 442 at p 450).

[101] The Children's Rights Bill, introduced by Baroness Walmsley on 20th November 2009; though its failure was due to lack of Parliamentary time, which is controlled by the executive and so is not necessarily reflective of *Parliament's* will.

[102] See, eg JE Coons and RH Mnookin, 'Towards a Theory of Children's Rights' in IFG Baxter and EM Eberts (eds), *The Child and the Courts* (Sweet and Maxwell, 1978) and S Parker, 'The Best Interests of the Child - Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26. A good example of the malleability of best interests can be seen in *SG:* see the difference between, on the one hand, Lord Carnwath's treatment of children's best interests and the benefit cap, and on the other, Lord Hughes who, at para [153], suggests that the very direct impact on children in households subject to the benefit cap must be balanced against the general best interest of children 'in promoting the legitimate aims of reducing a culture of benefit-dependency and encouraging work', which is, with respect, a rather disingenuous way to prioritise the Government's agenda. A unfavourable court could also narrowly interpret 'in all actions concerning children' to exclude claims such as that made in SG. See Lord Hughes, paras [149]-[152].

[103] Which imposes on a range of public bodies a duty to have regard to the need to safeguard and promote the welfare of children. This general obligation is in addition to the various statutory obligations which require paramount consideration be given to the child's best interests in matters relating to her upbringing (see eg Children Act 1989, s 1; and – since ratification of the UNCRC – the Children and Adoption Act 2002, s 1(2)).

[104] *ZH (Tanzania)* fn 55 above, para [23], as per Lady Hale.

[105] Further, Art 3(1) is considered by the UN Committee on the Rights of the Child to be directly applicable and capable of being invoked before a court (see General Comment No 14, para 6). The language of Art 3(1) is also precise and imposes a clear obligation ('shall'), unlike other provisions which use nomenclature such as 'strive', 'encourage', 'ensure'. See J Williams, 'Multi-level Governance and CRC Implementation' in A Invernizzi and J Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, 2011) and the discussion pp 241-244. This is borne out in the experiences in other jurisdictions: Lundy et al (above, fn 100) note that Article 3 is the right that has been most incorporated into domestic *constitutional* provisions; it is also the provision which is most cited in courts across the world (see CRIN, *CRC in Court: The Case Law of the Convention on the Rights of the Child* (2012). Available at: http://www.crin.org/en/library/publications/crc-court-case-law-crc (last visited 21 August 2015).

[106] Though some functions carried out by Government ministers are included: for example see s 11(1)(ja) and see also the equivalent provision in the Borders, Citizenship and Immigration Act 2009, s 55.

The position is different, however, in relation to the other legislatures in the UK, where commitment to the UNCRC has been demonstrated through the adoption (in Wales) of the Rights of Children and Young Persons (Wales) Measure 2011[107] and (in Scotland) the Children and Young People (Scotland) Act 2014.[108] At the least, this mitigates Sales and Clement's concern that direct enforceability of treaty provisions (here, Article 3(1)) would effectively allow the UK Government to bind its devolved counter-parts as to the exercise of their competences.[109] Furthermore, judicial treatment of Article 3(1) as directly effective *across* the UK would help to mitigate some of the regional differences in children's rights protection emerging in the post-devolution settlement.[110]

The second (related) objection to the 'exception' argument is that if treaty provisions are directly effective the executive can impose duties on its citizens that have not been subject to Parliamentary debate and approval. Prima facie, human rights treaties circumvent this difficulty because they confer *rights*, not obligations. However, judicial precedent on the constitutional objections to direct enforceability of treaty provisions does not draw a distinction between duties and rights,[111] and the conferral of rights on one group – especially where they are socio-economic in nature as in *SG* – often incurs costs for other citizens.[112] This is not to suggest that the interests of children (including those that are socio-economic in nature) should *not* be prioritised[113]; but rather that it is for the legislature to determine this,

[107] Imposing a duty on Welsh ministers to have regard to the Convention.
[108] See s 1 duty on Scottish ministers to 'keep under consideration' whether any steps can be taken to better secure children's rights.
[109] Sales and Clement, fn 88 above: 'the devolved institutions have still less control over the assumption of obligations in international law than does the Westminster Parliament, yet within their designated areas of competence it is they which have democratic legitimacy and full legislative power'.
[110] Thus, as Jane Williams argues, ensuring the UK complies with the UNCRC non-discrimination principle. Williams, fn 105 above, at p 258.
[111] See *JH Rayner,* fn 86 above at 500: *'*a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta *from which they cannot derive rights* and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but *also because, as a source of rights and obligations, it is irrelevant*'.
[112] Sales and Clement, above fn 88.
[113] See Nolan, fn 6 above and R Dixon and M Nussbaum, 'Children's Rights and A Capabilities Approach: The Question of Special Priority' (2012) 97 *Cornell Law Review* 549.

not the courts.[114] As Campbell has noted, 'human rights are diminished when we seek to cure democratic deficiencies by anti-democratic devices'.[115]

Lord Kerr did not have to find that Article 3(1) was directly enforceable in order to achieve the outcome he wanted: he could have – and indeed did, as an alternative – followed Lady Hale's more constitutionally conservative reasoning. Perhaps then his progressive approach stemmed from frustration at the Government's failure to abide by its own recent commitment to comply with the UNCRC,[116] or perhaps it was an attempt to bolster children's rights in light of the Conservative Government's proposed repeal of the HRA which will deprive children of their domestically enforceable ECHR rights *and* remove the primary vehicle for the UNCRC.[117] Although a British Bill of Rights is likely to replace the HRA, it is *un*likely to include children's rights specifically[118] and there will be no obligation on the domestic courts to interpret its content in line with the UNCRC[119]; although since the rights therein will by their nature be 'ambiguous' (thus allowing international treaties to be used as an interpretative tool), it would be surprising if they did not. Nonetheless, it is worth noting that not all judges are receptive to the UNCRC and, as *R (T) v Secretary of State for Justice* indicates, its use can be restrictively applied.[120] In light of these circumstances it is perhaps not surprising that Lord Kerr adopted the rather radical approach that he did.[121]

---

[114] This is not to question whether the courts are, or are not, equipped to make assessments as to what the best interests of children requires: the question of whether article 3(1) is directly effective is a different question from *how* and by whom best interests are best determined.

[115] T Campbell, 'Human Rights Strategies: an Australian alternative' in T Campbell, J Goldsworthy, and A Stone (eds) *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006), quoted in Williams, fn 105 above, at p 243. Campbell's alternative suggestion – that there is a stronger scrutiny role for Parliament – has not worked in the context of children's rights in the UK. See for example, the Joint Committee on Human Rights' scrutiny of the Welfare Reform Bill that did not result in a more child-friendly scheme. See *Legislative Scrutiny: Welfare Reform Bill* Session 2010—2012, 21st Report, para 1.35. See also Lady Hale at para [216].

[116] See Cabinet Office Guide to Making Legislation (July 2013), para 11.30.

[117] There is evidence that the judiciary are generally attempting to embed human rights (and its methodology) in the common law, separate from the HRA, in anticipation of its repeal. See, eg *Osborn v Parole Board* [2013] UKSC 61; [2013] 3 WLR 1020 and *Pham v Secretary of State for the Home Department* [2015] UKSC 19.

[118] Indicated by the Commission on the 2012 Bill of Rights Commission's report (*A UK Bill of Rights: The Choice Before Us),* the Conservative Party's sketchy proposals in October 2014, and the Government's refusal to ratify the Third Optional Protocol (which introduces an individual complaints mechanism). See Joint Committee on Human Rights, fn 78 above and K Hollingsworth, 'The Utility and Futility of International Standards for Children in Conflict with the Law: The Case of England and Wales' in L Weber, E Fishwick and M Marmo (eds) *Routledge Handbook of Criminology and Human Rights* (Forthcoming).

[119] The obligation to do so under the HRA comes from the courts' duty to have regard to Strasbourg jurisprudence under section 2 HRA; and Strasbourg takes account of the UNCRC because of its obligation under the Vienna Convention (fn 52 above).

[120] It was held in *R (T)* that the UNCRC can only be used to interpret ambiguous legislation passed *after* ratification (1991). This decision is contrary to the dicta of Lord Browne-Wilkinson in *R v Secretary of State for*

Judicial Diversity, Judging and Children's Rights

Tobin has suggested that the use of the UNCRC in judicial decision-making '. . . provides a very strong indication of the extent to which the relevant international norms have been internalised and brought to life within the domestic legal system'.[122] If the decision in SG provides a 'litmus test'[123] for how far we have come in the protection of children's UNCRC rights in England and Wales, and how far there is to go, the result is inconclusive: the judgments given by the five Justices span across Tobin's 'spectrum' of judicial approaches to children's rights from the 'incidental'[124] and 'selective' approaches[125] of Lords Reed and Hughes, to the 'substantial' approach adopted by Lady Hale and Lord Kerr.[126]

---

the Home Department, ex parte Venables [1998] AC 407 at para [499] that it is legitimate to 'assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country'. The European Court of Human Rights is also willing to use the UNCRC to re-interpret and reconsider its earlier case-law (ie that prior to the adoption of the UNCRC). See Kilkelly (2001), fn 53 above at pp 315-316.

[121] If Parliament do not like this approach, they can legislate to clarify that Article 3(1) is not directly enforceable (though this may in itself raise separation of powers issues): see eg, the Administrative Decisions (Effect of International Instruments) Bill 1997 introduced in Australia (but which did not make it on the statute book), the preamble of which stated: 'international instruments by which Australia is bound or to which Australia is a party do not form a part of Australian law unless those instruments have been validly incorporated into Australian law by legislation. It is the role of Commonwealth, State and Territory legislatures to pass legislation in order to give effect to international instruments by which Australia is bound or to which Australia is a party'.

[122] Tobin, fn 9 above at p 580.

[123] Ibid.

[124] Tobin, fn 9 above at p 596: Children's rights are 'not considered to be essential to either the conceptualisation or resolution of the issues before a court'. See eg Lord Reed at para [89]: 'The conclusion that the cap is incompatible with the UNCRC rights of the children affected therefore tells one nothing about whether the fact that it affects more women than men is unjustifiable under article 14 of the Convention read with A1P1' and Lord Hughes (on whether Article 3(1) is relevant to the legal issue) at para [146]: 'In the case of A1P1 coupled with article 14, the children's interests may well be affected (as here), but they are not part of the woman's substantive right which is protected, namely the right to be free from discrimination in relation to her property. There is no question of interpreting article 14 by reference to the children's interests'.

[125] Tobin, fn 9 above at p 597: '[T]he analysis offered is not grounded in a comprehensive and internally coherent application of the CRC and its underlying model of human rights – only parts of the model are selected by the court'. See eg Lord Hughes' discussion of whether the Secretary of State had complied with Article 3(1), and concluding he had, partially defended this position by pointing to General Comment No 14 of the United Nations Committee on the Rights of the Child to 'balance' the rights of children specifically affected by the cap and 'the interests of children generally in promoting the legitimate aims of reducing a culture of benefit-dependency and encouraging work' (para [153]); that is, seemingly prioritising this general, non-proven benefit over the potential but direct harm to the health, education and development of children affected by the cap.

[126] Tobin, fn 9 above. This can involve applying a children's rights approach to the conceptualisation of the issues, the procedures adopted to resolve the issue and the content of the rights. In relation to Art 3(1) it involves considering the wishes of the child (where relevant), the relevance of other rights under the UNCRC (see eg Lady Hale at para [227]); the particular circumstances of the child (paras [169]ff); and empirical evidence.

That the UNCRC has not been incorporated into UK domestic law of course imposes an institutional constraint on the Court in its adjudication of children's rights:[127] a constraint that Lords Reed and Hughes were unwilling, and Lord Carnwath felt unable, to circumvent in this case. Nonetheless, the strong dissents in *SG* reveal that it is not the legal status of the UNCRC (alone) which determines whether or not judges adopt a children's rights approach.[128] Instead, in 'close-call' or 'hard cases',[129] where the 'rules run out'[130] and where neither legal doctrine nor precedent dictate the outcome, there is a discretionary space within which judges exercise their personal judgment in deciding the 'right' or most just outcome. This space is larger where the adjudication concerns human rights where judges must necessarily balance competing interests that often engage – as in *SG* – contentious political, moral, economic and social issues.[131] The extent to which the reasoning and outcomes that emerge in such cases meaningfully engage with children's rights, rather than rendering them invisible or irrelevant,[132] depends, argues Tobin, on whether judicial 'moral reasoning is informed by an interest theory of rights consistent with the model under the CRC'.[133] Tobin goes on to observe that '[s]ome judges will actively embrace the notion of children as rights-bearers whereas others will be less familiar with or receptive to the model and lack the capacity or preparedness to apply it to the resolution of disputes involving children'.[134] Because judges are more likely to employ a substantive children's rights approach where

[127] Other procedural factors may inhibit the courts from adopting a children's rights approach. For example, Tobin identifies the nature of proceedings, whether they are initiated by children or adults, whether children have legal representation and so on. Tobin, fn 9 above at p 620.

[128] Indeed, incorporation would not necessarily guarantee a children's rights approach, given the tensions that can exist between different rights, and questions that remain in relation to their scope, and the resolution of conflict (see eg J Fortin, *Children's Rights and the Developing Law* (Cambridge University Press, 2009, 3rd ed) at p 43 and in the context of youth justice see K Hollingsworth, 'Theorising Children's Rights in Youth Justice: The Significance of Autonomy and Foundational Rights' (2013) 76 *Modern Law Review* 1046).

[129] See eg, R Dworkin *Taking Rights Seriously* (Duckworth, 1977). Close call cases are identified by Cahill-O'Callaghan as those where a single judicial decision separates the majority and minority (eg 3:2). In the Supreme Court, 8% of decisions are close calls. R J Cahill-O'Callaghan, 'The influence of personal values on legal judgments' (2013) 40 *Journal of Law and Society* 596 at p 597.

[130] E Rackley, *Women, Judging and the Judiciary* (Routledge, 2013) at p 131.

[131] Referring to the HRA, Lady Hale has commented that it has 'clearly increased the social and "small p" political content of the judging task'. B Hale, 'Equality in the Judiciary: A Tale of Two Continents', 10th Pilgrim Fathers' Lecture, 2003, cited in A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) at p 304-05. See also T Etherton, 'Liberty, the archetype and diversity: a philosophy of judging' (2010) *Public Law* 727 at p 728.

[132] See Tobin, fn 9 above at p 621ff. This is not only in relation to how the UNCRC is used – though that is the focus of this commentary – but, more generally, a space within which a broader 'children's rights approach' can be adopted: one where children are seen and heard; where their separate interests are articulated and not conflated with adults'; where there is recognition of the child as 'being' *and* 'becoming'; and where a holistic approach is adopted that accounts for all of the child's interests, including those founded in autonomy (ie Tobin's 'substantive' approach, above fn 126).

[133] Tobin, fn 9 above at p 622.

[134] Ibid at p 623

there has been 'prior exposure to the values that underpin this model',[135] Tobin advocates judicial training in children's rights in order to shape the 'framework of moral reasoning and interpretative theory they apply when resolving a case . . .'.[136]

Welcome though training and awareness-raising aimed at infusing judicial reasoning with a children's rights approach would be, it is likely to only go so far. It is not only 'judicial philosophy'[137] that impacts on a judge's resolution of 'hard cases'; it is also his or her 'background, upbringing, education, convictions and temperament'.[138] Judges are individuals and, like anyone else, their decision-making is affected by their personality, experiences, attitudes, preferences and personal values.[139] Therefore, the split decision in *SG* may not (only) reflect the propensity of the individual judges to adopt – or not - a 'children's rights approach' (as a result, perhaps, of 'prior exposure'[140]), but may also signal other differences – explicit and tacit[141] - between the judges. Thus, as Erika Rackley has so well argued, it matters *who* the judge is; and it matters therefore, that there is judicial diversity.

Feminist Judging and Children's Rights

Much of the recent literature on judicial diversity has focused on gender and has asked the question of whether women judges bring a 'gendered sensibility to the process of decision-

[135] Ibid p 624.

[136] Ibid at p 624. One of the aims of the 'Children's Rights Judgments Project' which commenced in January 2015 is to explore the possibilities of adopting children's rights approaches in adjudication. The project involves the re-writing of 31 judgments from multiple jurisdictions (including supra-national courts). See http://www.liv.ac.uk/law/research/european-childrens-rights-unit/childrens-rights-judgments/ (AHRC grant ref: AH/M009033/1 co-ordinated by Helen Stalford (Liverpool University) and Kathryn Hollingsworth (Newcastle University).

[137] '[t]hat is to say their view of the judicial role': Etherton, above fn 131 at p 740.

[138] Lord Mustill in *Airedale NHS Trust v Bland* [1993] 789, pp 887-888 quoted in Rackley above n at p 130. Of course, these factors impact on the judges 'judicial philosophy' as well; they are inseparable.

[139] RJ Cahill-O'Callaghan, 'Reframing the judicial diversity debate: personal values and tacit diversity' (2015) 35 *Legal Studies* 1. Though of course, as noted above, this is not unfettered; individual characteristics and preferences come into play where there is scope for alternative reasoning and outcomes. In many cases, this will simply not be the case because the legal rules and principles are clear. In the United States, judicial attitudes have been mapped on to a left-right (liberal-conservative) axis, but – notwithstanding the work of JAG Griffith - most UK scholars reject evidence of political bias in the UK Supreme Court/House of Lords. See for example C Henratty, 'The Decisions and Ideal Points of British Law Lords' (2013) 43 *British Journal of Political Science* 703 and TT Arvind and L Stirton, 'Legal Ideology and Legal Doctrine: A Study of the Decisions and Ideal Points of the Law Lords' (copy on file with author).

[140] For example, Lady Hale's experience as an academic family lawyer.

[141] Cahill-O'Callaghan, ibid.

making'.[142] Two theories are proffered for why and how gender matters to judicial reasoning: first, that women bring different life experiences to judging (including those related to motherhood, and to sexism and discrimination); second, that there are gender differences in moral reasoning, with women reasoning from an 'ethic of care' (one that is concerned with responsibilities, relationships, inter-dependencies, and focused on concrete circumstances[143]) and men from an 'ethic of justice' (which prioritises the abstract, atomistic self, hierarchy, and impartiality).[144] Although there is little empirical evidence to support the claims that male and female judges *necessarily* reason (and thus judge) differently[145] (and strong anti-essentialist reasons to object to the assertion[146]), or that women *necessarily* bring their unique experiences to bear, according to Hunter 'both theories appear to contain some grains of truth'.[147] Rackley also concludes that there is qualitative, if not quantitative, evidence in support of the assertion that women judges *can* make a difference.[148]

Lady Hale's judgments have of course provided a rich source of evidence[149] and *SG* provides another example of the difference she brings, particularly when juxtaposed with the leading judgment given by Lord Reed. It is not possible to determine whether Lady Hale's judgment contrasts so starkly with Lord Reed's because she is a *woman* (and because he is a man),[150] but the differences between the two exemplify well the potential impact of *feminist* judging, which may be informed and shaped by gendered experiences. Characteristics of feminist judging include the employment of narrative, the location of legal issues within the broader structural and social context, reasoning from 'the reality of lived experiences rather than in abstract, categorical terms', and an emphasis on the relational self.[151] A feminist judge therefore helps to expose the differential and sometimes unfair consequences of the 'neutral' application of the law and makes visible the experiences and interests of less powerful groups; women, of course, but also children.

---

[142] R Hunter, 'More than just a Different Face? Judicial Diversity and Decision-Making' (2015) *Current Legal Problems* 1 at p 6. See also Rackley, fn 130 above and 'Detailing Judicial Difference' (2009) 17 *Feminist Legal Studies* 11.

[143] See Rackley's discussion, above fn 130 at p 138ff.

[144] C Gilligan *In a Different Voice* (Harvard University Press, 1982) and see Rackley's discussion, above fn 130.

[145] See Hunter, fn 142 above for an overview.

[146] Ibid, and Rackley, fn 130 above.

[147] Hunter, fn 142 above at p 7.

[148] Rackley fn 142 above.

[149] See Rackley, fnn 130 and 142 above, who also warns against the dangers of 'cherry-picking' cases that evidence difference rather than similarity between Lady Hale and her male counterparts.

[150] Not least because Lord Kerr concurred with Lady Hale's judgment and she was in agreement with Lord Carnwath's children's rights analysis, which suggests that gender alone is not a sufficient explanation.

[151] Hunter, fn 142 above at p 13. For examples of (fictional) feminist judging, see eg Hunter et a, fn 10 above.

It is perhaps more likely therefore, that a feminist judge will also be one who adopts what might be described as a children's rights approach: not (only) one that employs as far as possible the UNCRC to the issue at stake (in the ways described in Tobin's substantive approach), but (also) one that uses a methodology that enhances and is aligned with the values underpinning those rights. For example, the use of narrative allows children's voices and experiences to be heard[152]; locating legal issues within the broader structural context and prioritising concrete experiences over the abstract draws attention to children's 'unique vulnerability'[153] (derived from their economic, social, political and legal dependencies[154]) which provides justification to prioritise their interests[155]; and, by taking a relational approach, a concept of 'self' that is more applicable to children emerges, one that recognises that individuals are 'constituted by networks of relationships of which they are a part';[156] a clear example of which is the idea that children are shaped by their families,[157] as well as their communities (including schools) and the wider structures and social values that influence and affect how they experience the world.[158] A relational approach to children's rights is therefore one that is cognisant of that embeddedness and which interprets and applies the law such that relations are configured in a way that promotes underpinning values including equality, (gathering) autonomy, or best interests/welfare.[159] Importantly, this can be achieved and (inter-)dependencies recognised, *without* denying children's status as rights-holders. Indeed, it can ensure, as in *SG*, that when considering the rights of parents, the rights of their children must also be addressed.

In *SG*, the difference between the feminist approach of Lady Hale and that of Lord Reed is exemplified well in their respective consideration of the ability of lone parents to mitigate the impact of the benefit cap. The impetus for the Coalition Government's welfare reforms, in addition to the ostensible aim of cutting expenditure, is responsibilisation: to reduce

[152] See eg Article 12 UNCRC.
[153] Dixon and Nussbaum, fn 113 above and Nolan, fn 6 above.
[154] For example, that they are (usually) reliant on their parents (or other carers, or the state) to meet their basic needs such as food and shelter since legal and economic structures prohibit full-time working; or that parents are conferred with decision-making powers over the lives of their children. See also Lord Kerr at para [226].
[155] See again, Dixon and Nussbaum, fn 113 above and Nolan, fn 6 above.
[156] J Nedelsky *Law's Relations: A Relational Theory of Self, Autonomy and the Law* (Oxford University Press 2011) p 19
[157] Ibid.
[158] And that can be positive or negative.
[159] Nedelsky, fn 156 above.

individuals' dependency on state welfare and to encourage self-reliance.[160] Groups that are too vulnerable or are otherwise unable to support themselves through work (pensioners, people with disabilities) – the 'deserving poor'[161] – are excluded from the benefit cap. Others, including lone parents (the undeserving poor?[162]), are expected to mitigate the cap in the ways outlined earlier in this commentary: through employment; relocation; negotiating lower rents; securing child support from absent parents (usually fathers); or reducing out-goings. Structural and practical barriers - including over-inflated house prices, employment shortages, a low wage and insecure job market, gender and class power disparities, inadequate and expensive child-care, and so on – are written out of the welfare reforms' neo-liberal emphasis on personal responsibility.

The conceptualisation of the responsibilized, atomistic citizen, one who is as equally free and autonomous as the next person (a non-relational, non-contextualised account), underpins Lord Reed's reasoning. He rejected the arguments that lone parents face particular difficulties in mitigating the effects of the cap because of the problems of securing adequate childcare, and thus employment, by pointing to abstract statistics that showed since *some* lone parent households (about 10%[163]) *had* been able to secure work to mitigate the cap,[164] then *any* lone parent should be able to. In contrast, Lady Hale focuses on the effects of inadequate childcare on the welfare of children, observing that child care professionals consider 'the full time loving care' of a parent better for young children's welfare than institutional day care, and she points out (indirectly) that the Government is denying to parents subject to the cap the choice that it gives to other lone parents of children under five not to work. Further, she uses the specific example of NS to argue that 'we should not accept that their children's welfare should be put at risk by their having to make unsatisfactory child care arrangements

[160] S Lowe and J Meers, 'Responsibilisation of Everyday Life: housing and welfare state change' in Z Irving, M Fender and J Hudson (eds), *Social Policy Review 27: Analysis and Debate in Social Policy, 2015* (Policy Press, 2015).
[161] Ibid.
[162] There is a hint of this in some of the statements in *SG*: see eg Lord Hughes' differentiation between 'those who worked and paid taxes and those who did not' at para [135] or Lord Reed's insistence that the 'stigmatisation' that faces welfare recipients would be addressed by reducing benefit payments (placing the burden for addressing that stigma on those suffering it).
[163] The figures showed that 29% of lone parent households who had been capped no longer were subject to it; 38% of whom had secured work.
[164] Para [74].

or . . . to rely upon assistance from a violent partner which the local children's services authority fears may put the children at risk'.[165]

Lord Reed's judgment is similarly blind to the negative effects on children of relocation, particularly for children living in poverty, and his reasoning here is based on a selective use of the facts that allows an obfuscation of the prior and current constraints that women such as SG and NS experience, such that they may not enjoy the freedom he suggests:

> . . . In relation to the argument that households with children cannot reasonably be expected to move house, because of the impact on the children, it is not merely a forensic point that one of the two adult appellants came with her family to the UK from Belgium, and the other adult appellant came with her family to the UK from Algeria. Millions of parents in this country have moved house with their children, for a variety of reasons, including economic ones. It is, in particular, not uncommon for working households to move out of London in order to find more affordable property elsewhere.[166]

Not only does Lord Reed choose here to draw on the experiences of SG and NS, where earlier in the judgment he rejected their specific circumstances as irrelevant to a challenge to the *regulations* (rather than how they apply in a particular case)[167], but he also chooses not to explain that SG left Belgium because she was fleeing her abusive husband, and that she moved specifically to Stamford Hill because she is an orthodox Jew and '[t]he school age children attend a local Jewish school, kosher food is readily available (but expensive) in the local shops, they can walk to the synagogue and there is a support network of family and friends there', including her eldest daughter.[168] This detail we learn from Lady Hale's much fuller narrative that exposes the gendered power relationships that shaped the previous experiences of the applicants (and, presumably, other women like them) in a way that limits their current choices to relocate or, in the case of NS, (whose abusive husband allowed her

[165] Para [202].
[166] Para [75].
[167] He does this, it seems, because describing the appellants in ways that emphasise their (apparent) autonomy/freedom (and which also serves to prompt us, perhaps, to perceive them as insecurely connected to the area) supports his reasoning that the cap *can* be mitigated.
[168] Para [170] as per Lady Hale.

little freedom and who does not speak English), to work; and which in turn affects the support (community and state) needed to parent well.

Of course, as Lord Reed points out, many parents do choose to move home and may do so for economic reasons.[169] The benefit cap, however, removes choice and requires households, against their will, to relocate away from the communities within which they and their children may be deeply embedded and dependent for cultural, emotional and practical support (as with SG). Moreover, the stability that we hope a 'home' provides for children[170] is absent even after moving: their lives remain insecure and beyond their (and their parents') control because the cap may be further reduced (as we have seen post-general election), and may again require relocation. It is these types of precarious conditions that undermine a parent's dignity and autonomy, and her ability to provide the environment best suited to meet her children's welfare needs and developing autonomy. Relocation also often has the secondary impact of requiring children to change schools, which as well as disrupting their learning and their friendships (which are already 'severely tested' for low-income children[171]), may also bring renewed exposure to the stigma, stress, exclusion and bullying that children living in poverty often experience.[172] Such relational analysis is absent from Lord Reed's judgment, and in stark contrast to Lady Hale's which provides an account that emphasises both the inter-dependency of the interests of parent and child and the structural and legal barriers facing lone parents in mitigating the cap. This in turn affected the assessment of whether the scheme was compatible with Article 3(1) and also more generally whether the justifications put forward by the Government for a discriminatory welfare cap scheme were legitimate.

---

[169] Though he may have in mind a professional couple who swap a two-bedroomed flat in Stoke Newington for a larger Surrey home, rather than the working poor who move from one inadequate property to another.

[170] 'Home', rather than mere accommodation, implies the location of identity, memory, love, privacy, reciprocity and safety – all crucial to a child's well-being and development. See L Fox, *Conceptualising Home* (Oxford 2007) and J Hohmann, *The Right to Housing: Law, Concepts, Possibilities* (Oxford 2013). See also P Allat, 'Conceptualising Parenting from the Standpoint of Children: Relationship and Transition in the Life Course' in J Brannen and M O'Brien (eds), *Children in Families: Research and Policies* (London 1996).

[171] See T Ridge, 'The Everyday Costs of Poverty in Childhood: A Review of Qualitative Research Exploring the Lives and Experiences of Low-Income Children in the UK', *Children and Society* 25 (2011) 73-84

[172] Ridge, ibid at at 78 ('Repeated moves brought extreme stress and anxiety and, for some, vulnerability to bullying and poor mental health' and at 82: 'The personal and relational aspects of poverty can bring stigma, shame, sadness and the fear of being identified or isolated for being different'. See also Through their Eyes - The Children's Commission on Poverty, *At What Cost? Exposing the Impact of Poverty on School Life* (The Children's Society, 2014) and Office of the Children's Commissioner, '"Trying to get by": Consulting with Children and Young People on Child Poverty' (2011). On education, see Lady Hale at para [206].

SG provides an excellent example of how the facts that are told – or not told – support the philosophical position of each Justice (for Lord Reed, a focus on the individual responsibility of parents, including for their children's welfare which, when mentioned, is abstract and generic; and for Lady Hale, a view of the individual (parent and child) as relational, embedded and shaped by her relationships, community and social structures:), and signposts the judicial decision that follows. Although Lady Hale's dissenting judgment did not ultimately affect the outcome of the case, it exemplifies Rackley's (and others') claims that *who* judges matters: and, by providing a counterpoint to Lord Reed's judgment, it also exposes the fallacy of judicial neutrality.[173]

Moreover, the case demonstrates that adopting a *feminist* approach to adjudication – one that is contextual, concrete, provides narrative, and sees the self as relational not atomistic – can also provide a strong basis for a *children's rights* approach. It is more conducive to hearing children's voices and understanding the experiences and realities of their lives and it better reveals their unique vulnerabilities.[174] This is not, however, the same as arguing that children's *substantive* rights and women's *substantive* rights always coincide: rather that the *methodology* of feminist judging can also reinforce the methodology of children's rights.

Tacit Influences on Children's Rights Judging

Other attitudes and values may provide an additional explanation for the diversity in judicial approach in *SG*. Cahill O'Callaghan, for example, has drawn on psychological theory to argue that 'personal values serve as tacit influences on judicial decision making' and her analysis of Supreme Court cases suggests significant variation in how those personal values are manifested in the judgments of individual Justices.[175] Of significance to the outcome in *SG*, for example, might be her finding that Lord Kerr had the highest coding for the value of 'universalism'[176]: defined as 'understanding, appreciation, tolerance and protection for the welfare of all people . . . and includes values such as equality, protection of the vulnerable and social justice'.[177] Lord Kerr's strong defence of children's rights – both in terms of the

[173] See again the work of Erika Rackley.
[174] Though not highlighted here, a relational account also recognises that to be autonomous one can also be dependent.
[175] Cahill-O'Callaghan, above fnn 129 and 139.
[176] Over half of the coding of values in his judgments reflected this value.
[177] Cahill-O'Callaghan, above fn 139 at p 12.

direct enforcement of Article 3(1) and its application in this case[178] - may therefore have been predicted.[179] Unsurprisingly perhaps, Cahill-O'Callaghan also found that Lady Hale espoused values captured in 'universalism' in a large proportion of her expressed value statements.[180] One further finding from this study is worth noting for its relevance to *SG* and that is that Lord Kerr's judgments generally scored below average on 'tradition' and 'conformity', a value which encompasses 'adherence to legal traditions such as precedent and respect for Parliamentary authority'.[181] His Lordship's willingness to challenge the constitutional status quo regarding unincorporated treaties appears in-keeping with the values he generally espouses – or not - in his judicial reasoning.

Cahill-O'Callaghan's findings are of interest because they serve to illustrate that the judiciary is not homogenous and interchangeable, and nor can the differences between individual Justices be accounted for solely on the grounds of demographic characteristics, such as gender.[182] Rather, judges are individuals who espouse individual values. How or whether particular values can be more or less closely associated with the adoption of a 'children's rights approach' to judging may depend on the particular case: what rights are at stake for the child, how much it requires the court to stretch judicial precedent or constitutional principle and so on. But we might assume that a judge who demonstrably values universalism (social justice, protection of the vulnerable, equality) and self-direction (autonomy and freedom) – like Lady Hale[183] - will be more amenable to, or more adept at, adopting a children's rights approach.

[178] See especially para [269]: 'It cannot be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing. Depriving children of (and therefore their mothers of the capacity to ensure that they have) these basic necessities of life is simply antithetical to the notion that first consideration has been given to their best interests'.

[179] Cahill-O'Callaghan found that the diversity of values expressed in the judgments was also reflected in the outcomes reached.

[180] 38%.

[181] See also the analysis of Arvind and Stirton (fn 139 above), who use statistical modelling to argue that judicial difference is located in attitudes to legal doctrine rather than political attitudes. They analysed judgments against a red-light/green-light axis (from Harlow and Rawlings' administrative law theory) and found that Lord Kerr and Lady Hale were the two judges most to the 'red light' end of the scale: that is, they were most likely to intensely scrutinise the actions of Government and public bodies. This is also borne out in the decision in *SG*.

[182] She also argues that the study refutes JAG Griffith's claim that the judiciary are homogenous in a 'class-conditioned' sense: the decision in SG would also support this.

[183] Cahill-O'Callaghan, fn 149 above, identifies these as two of the most prominent values in Lady Hale's judgments and extra-judicial writing.

Concluding Comments

Although SG concerned the discriminatory impact on women of the benefit cap, at its heart was children's rights. The utility of the cap was absolutely dependent on the inclusion within it of child-related welfare benefits: if they were excluded, the Government willingly admitted, the scheme would be 'emasculated'. That is, vulnerable children are being placed (further) into poverty in order to save public expenditure and to incentivise *adults* into work. We might ask, as Lord Carnwath did: '. . . why the viability of a scheme, whose avowed purpose is directed at the parents not their children, is so disproportionately dependent on child related benefits'.[184] For three of the Justices this was sufficient to demonstrate that the Secretary of State had breached his international duty to give primary consideration to the best interests of children, but only two were able to transform this into a domestic legally relevant obligation. Nonetheless, *SG* illuminates some of the conditions that best promote a 'children's rights approach' amongst the judiciary: an appropriate interpretative theory, yes; but also feminist reasoning (possibly more common amongst women judges?) and judges who espouse values of universalism, self-direction and – where a more radical approach is needed – who reject 'tradition'. In these circumstances, even without the UNCRC being part of domestic law, small victories can be achieved for children's rights.

[184] Para [127].